IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**05-CV-0329 GKF-PJC**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

DEFENDANT PETERSON FARMS, INC.'S
RESPONSE TO PLAINTIFF'S SUBMISSION REGARDING DESIGNATIONS
AND OBJECTIONS TO DEPOSITION OF KERRY KINYON [DKT# 2773]

Defendant Peterson Farms, Inc. ("Peterson") hereby responds to the Plaintiff's submission of specific pages of Kerry Kinyon's deposition transcript and submission of State's Ex. 4009 attached as exhibits to the Plaintiff's Motion [Dkt # 2773]. Plaintiff cannot and has not established the foundational requirements for the admission of the testimony contained on pages 131:18-132:12 and 133:2- 133:13 or State Ex. 4009.

I. At the time of his deposition, Kerry Kinyon lacked the authority to bind or adopt any statement by Peterson.

Plaintiff's intended use of Kerry Kinyon's testimony is to have this Court draw an unsupported and inadmissible inference from State Ex. 4009 against all former contract growers for Peterson and all growers of the other Defendants regardless of whether those growers operated in and were subject to the regulatory framework and economic forces at play within the IRW. In order to use Kinyon's deposition for this purpose, Plaintiff must clear two hurdles: (1) the must meet the conditions of Fed. R. Civ. P. 32(a) by demonstrating that the deponent, when deposed, was the party's officer, director, managing agent, or designee under Fed. R. Civ. P. 30(b)(6) or 31(a)(4); and (2) if these conditions are met, that matters contained in the deposition are admissible under the rules of evidence. *See Garcia-Martinez v. City of Denver*, 392 F.3d 1187, 1191 (10th Cir. 2004); *see*

also 8A WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE & PROCEDURE § 2142, at 150. Plaintiff simply cannot meet either burden. First, Kinyon was not an employee at the time of his deposition and had not been designated by Peterson as a 30(b)(6) witness.

Second, although Plaintiff argues that Kinyon's testimony is not hearsay, it must meet at least one of the basic foundational requirements contained within the subsections of Fed. R. Evid. 801(d)(2). In order for Kinyon' testimony to be deemed an admission against Peterson, Plaintiff must: (1) show it was made in "a representative capacity" or authorized to make such a statement under subsections (a) and (c); (2) demonstrate that the statement was adopted by the company under subsection (b); or (3) show it that the matters were within the scope of the individual's employment and "*made during the existence of the relationship*" under subsection (d). Furthermore, Fed. R. Evid. 801(d)(2)(E) states that the statement alone is insufficient to meet this burden as it applies subsections (c) and (d). This is burden, Plaintiff simply cannot meet.

Kinyon at the time of his deposition was no longer employed by Peterson nor was he designated as a 30(b)(6). Plaintiff claims that it is beyond dispute that Kinyon's deposition testimony is not hearsay because it was made under oath. This unsupported analysis oversimplifies, and further ignores the foundational requirements listed under the sub-parts of 801(d)(2). In reviewing the testimony the State seeks to introduce, the following can be ascertained: (1) Kinyon "vaguely" remembered the document; (2) the majority of the questions seek to improperly have Kinyon simply read the contents of the document rather than testifying about his factual recollection at the time; and (3) finally, Plaintiff is improperly attempting to elicit an admission from a former employee who is not authorized to speak on the Peterson's behalf regarding the meaning of the email (133:2-7).

I. State's Ex. 4009 is Irrelevant, Prejudicial and contains Hearsay within Hearsay

The admissibility of State's Ex. 4009 suffers from the same fatal flaws as Kinyon's testimony regarding the document. The email identified as State's Ex. 4009 contains multiple layers of hearsay. As stated previously, pursuant to Fed. R. Evid. 801(d)(2)(e), the fact that Mr. Bain wrote the email is insufficient to establish Mr. Bain's authority to speak for Peterson or that his actions were within the scope of his employment. Plaintiff has made no attempt to establish Mr. Bain had the authority to bind Peterson. Additionally, within the email, Mr. Bain is purportedly relaying the contents of a survey of the contract growers. Relaying the contract growers' responses especially when extrapolated to the whole is also unreliable and inadmissible hearsay. Plaintiff has also failed to demonstrate that either layer of hearsay is admissible under the Federal Rules of Evidence.

Plaintiff has also failed to demonstrate that this hearsay falls within an exception under the Federal Rules of Evidence. This email is not a business record under Fed. R. Evid. 803(6). Plaintiff has failed to demonstrate that the email or the matters contained within are typically created and kept as a regular practice of Peterson's business. Thus, absent an evidentiary foundation supporting this conclusion, this email and any hearsay within the email is inadmissible.

In addition to the fact that Ex. 4009 is fraught with hearsay, the contents of the document are irrelevant in these proceedings. The State has failed to lay the proper foundation as to this document's relevance in this action by demonstrating it is limited or even related to growers within the IRW. *Assuming arguendo*, the Court finds the document relevant, the prejudicial effect of the document outweighs its probative value. Fed. R. Evid. 403. It is highly probable that growers from other watersheds including the Eucha/Spavinaw watershed responded to this survey. Because the growers within the Eucha/Spavinaw watershed are operating under a stricter litter application standard than those within the IRW, they may value their litter differently than those growers within

the IRW. This is a critical fact Plaintiffs did not flesh out in their examination of Kinyon. Plaintiff has clearly stated its purpose in introducing this document is to seek an improper inference that **in the IRW** "some growers would give the litter away if someone would remove it." [pg. 2 of Dkt. 2773]. This type of inference has no meaningful probative value to this case. Whereas, allowing an unverified assumption to be drawn from a document, which does not clearly identify which watershed those responding to the survey were within, would clearly prejudice Peterson and the other Defendants in this case.

Peterson respectfully requests the Court grant its objections to the testimony of Kerry Kinyon identified at pages 131:8-132-12 and 133:2-133:13, and find State's Ex. 4009 inadmissible.

Respectfully submitted,

By /s Nicole M. Longwell

A. Scott McDaniel (Okla. Bar No. 16460) smcdaniel@mhla-law.com
Nicole M. Longwell (Okla. Bar No. 18771) nlongwell@mhla-law.com
Philip D. Hixon (Okla. Bar No. 19121) phixon@mhla-law.com
Craig A. Mirkes (Okla. Bar No. 20783) cmirkes@mhla-law.com
McDANIEL, HIXON, LONGWELL & ACORD, PLLC
320 South Boston Ave., Suite 700
Tulsa, Oklahoma 74103
(918) 382-9200
and
Sherry P. Bartley (Ark. Bar No. 79009)
Appearing Pro Hac Vice
MITCHELL, WILLIAMS, SELIG,
GATES & WOODYARD, P.L.L.C.
425 W. Capitol Ave., Suite 1800
Little Rock, Arkansas 72201
(501) 688-8800

COUNSEL FOR DEFENDANT
PETERSON FARMS, INC.

CERTIFICATE OF SERVICE

I certify that on the 2nd day of December 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General — drew_edmondson@oag.state.ok.us
Kelly Hunter Burch, Assistant Attorney General — kelly_burch@oag.state.ok.us

Melvin David Riggs — driggs@riggsabney.com
Richard T. Garren — rgarren@riggsabney.com
Sharon K. Weaver — sweaver@riggsabney.com
David P. Page — dpage@riggsabney.com
Riggs Abney Neal Turpen Orbison & Lewis

Robert Allen Nance — rnance@riggsabney.com
Dorothy Sharon Gentry — sgentry@riggsabney.com
Riggs Abney

Louis W. Bullock — lbullock@bullock-blakemore.com
Robert M. Blakemore — bblakemore@bullock-blakemore.com
Bullock Bullock & Blakemore

Michael G. Rousseau — mrousseau@motleyrice.com
Jonathan D. Orent — jorent@motleyrice.com
Fidelma L. Fitzpatrick — ffitzpatrick@motleyrice.com
Motley Rice LLC

Frederick C. Baker — fbaker@motleyrice.com
William H. Narwold — bnarwold@motleyrice.com
Elizabeth Claire Xidis — cxidis@motleyrice.com
Ingrid L. Moll — imoll@motleyrice.com
Mathew P. Jasinski — mjasinski@motleyrice.com
Motley Rice
COUNSEL FOR PLAINTIFFS

Stephen L. Jantzen — sjantzen@ryanwhaley.com
Patrick M. Ryan — pryan@ryanwhaley.com
Paula M. Buchwald — pbuchwald@ryanwhaley.com
Ryan, Whaley & Coldiron, P.C.

Mark D. Hopson — mhopson@sidley.com
Jay Thomas Jorgensen — jjorgensen@sidley.com
Timothy K. Webster — twebster@sidley.com
Gordon D. Todd — gtodd@sidley.com
Frank R. Volpe — fvolpe@sidley.com
Cara R. Viglucci Lopez — cvigluccilopez@sidley.com
Erik J. Ives — eives@sidley.com
Sidley Austin LLP

Robert W. George robert.george@tyson.com
L. Bryan Burns bryan.burns@tyson.com
Timothy T. Jones tim.jones@tyson.com
Tyson Foods, Inc.

Michael R. Bond michael.bond@kutakrock.com
Erin Walker Thompson erin.thompson@kutakrock.com
Dustin R. Darst dustin.darst@kutakrock.com
Kutak Rock LLP
COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND COBB-VANTRESS, INC.

R. Thomas Lay rtl@kiralaw.com
Kerr, Irvine, Rhodes & Ables

Jennifer S. Griffin jgriffin@lathropgage.com
Frank M. Evans, III fevans@lathropgage.com
Lathrop & Gage, L.C.
COUNSEL FOR WILLOW BROOK FOODS, INC.

Robert P. Redemann rredemann@pmrlaw.net
William D. Perrine wperrine@pmrlaw.net
David C .Senger david@cgmlawok.com
Gregory A. Mueggenborg gmueggenborg@pmrlaw.net
Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

Robert E. Sanders rsanders@youngwilliams.com
E. Stephen Williams steve.williams@youngwilliams.com
Young Williams P.A.
COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

George W. Owens gwo@owenslawfirmpc.com
Randall E. Rose rer@owenslawfirmpc.com
The Owens Law Firm, P.C.

James M. Graves jgraves@bassettlawfirm.com
Gary V. Weeks gweeks@bassettlawfirm.com
Woody Bassett wbassett@bassettlawfirm.com
K.C. Dupps Tucker kctucker@bassettlawfirm.com
Earl Lee “Buddy” Chadick bchadick@bassettlawfirm.com
Vincent O. Chadick vchadick@bassettlawfirm.com
Bassett Law Firm
COUNSEL FOR GEORGE’S INC. AND GEORGE’S FARMS, INC.

John R. Elrod jelrod@cwlaw.com
Vicki Bronson vbronson@cwlaw.com
P. Joshua Wisley jwisley@cwlaw.com
Conner & Winters, P.C.

Bruce W. Freeman — bfreeman@cwlaw.com
D. Richard Funk
Conner & Winters, LLLP
COUNSEL FOR SIMMONS FOODS, INC.

John H. Tucker — jtuckercourts@rhodesokla.com
Colin H. Tucker — chtucker@rhodesokla.com
Theresa Noble Hill — thillcourts@rhodesokla.com
Kerry R. Lewis — klewis@rhodesokla.com
Rhodes, Hieronymus, Jones, Tucker & Gable

Terry W. West — terry@thewesetlawfirm.com
The West Law Firm

Delmar R. Ehrich — dehrich@faegre.com
Bruce Jones — bjones@faegre.com
Krisann Kleibacker Lee — kklee@baegre.com
Todd P. Walker — twalker@faegre.com
Christopher H. Dolan — cdolan@faegre.com
Melissa C. Collins — mcollins@faegre.com
Colin C. Deihl — cdeihl@faegre.com
Randal E. Kahnke — rkahnke@faegre.com
Faegre & Benson LLP
COUNSEL FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC

Michael D. Graves — mgraves@hallestill.com
D. Kenyon Williams, Jr. — kwilliams@hallestill.com
COUNSEL FOR POULTRY GROWERS

William B. Federman — wfederman@aol.com
Jennifer F. Sherrill — jfs@federmanlaw.com
Federman & Sherwood

Charles Moulton — charles.moulton@arkansag.gov
Jim DePriest — jim.depriest@arkansasag.gov
Office of the Attorney General
COUNSEL FOR THE STATE OF ARKANSAS AND THE ARKANSAS NATURAL RESOURCES COMMISSION

Gary S. Chilton — gchilton@hcdattorneys.com
Holladay, Chilton & Degiusti, PLLC

Victor E. Schwartz — vschwartz@shb.com
Cary Silverman — csilverman@shb.com
Shook, Hardy & Bacon, LLP

Robin S. Conrad — rconrad@uschamber.com
National Chamber Litigation Center, Inc.
COUNSEL FOR AMICI CURIAE CHAMBER OF COMMERCE FOR THE U.S. AND THE AMERICAN TORT REFORM ASSOCIATION

Richard C. Ford — fordr@crowedunlevy.com

LeAnne Burnett burnettl@crowedunlevy.com
Crowe & Dunlevy
COUNSEL FOR AMICUS CURIAE OKLAHOMA FARM BUREAU, INC.

M. Richard Mullins richard.mullins@mcafeetaft.com
McAfee & Taft

James D. Bradbury jim@bradburycounsel.com
James D. Bradbury, PLLC
COUNSEL FOR AMICI CURIAE TEXAS FARM BUREAU, TEXAS CATTLE FEEDERS ASSOCIATION, TEXAS PORK PRODUCERS ASSOCIATION AND TEXAS ASSOCIATION OF DAIRYMEN

Mia Vahlberg mvahlberg@gablelaw.com
Gable Gotwals

James T. Banks jtbanks@hhlaw.com
Adam J. Siegel ajsiegel@hhlaw.com
Hogan & Hartson, LLP
COUNSEL FOR AMICI CURIAE NATIONAL CHICKEN COUNCIL, U.S. POULTRY & EGG ASSOCIATION AND NATIONAL TURKEY FEDERATION

John D. Russell Jrussell@fellerssnider.com
Fellers, Snider, Blankenship, Bailey & Tippens, P.C.

William A. Waddell, Jr. waddell@fec.net
David E. Choate dchoate@fec.net
Friday, Eldredge & Clark, LLP
COUNSEL FOR AMICUS CURIAE ARKANSAS FARM BUREAU FEDERATION

Barry G. Reynolds reynolds@titushillis.com
Jessica E. Rainey jrainey@titushillis.com
Titus Hills Reynolds Love Dickman & McCalmon

William S. Cox, III wcox@lightfootlaw.com
Nikaa B. Jordan njordan@lightfootlaw.com
Lightfoot, Franklin & White, LLC
COUNSEL FOR AMICUS CURIAE AMERICAN FARM BUREAU FEDERATION AND NATIONAL CATTLEMEN'S BEEF ASSOCIATION

A. Diane Hammons diane-hammons@cherokee.org
Attorney General, Cherokee Nation
Sara E. Hill sara-hill@cherokee.org
Assistant Attorney General, Cherokee Nation
COUNSEL FOR INTERVENOR, CHEROKEE NATION

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

J.D. Strong
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118
COUNSEL FOR PLAINTIFFS

Thomas C. Green
Sidley Austin Brown & Wood LLP
1501 K Street NW
Washington, DC 20005
COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND COBB-VANTRESS, INC.

Dustin McDaniel
Justin Allen
Office of the Attorney General of Arkansas
323 Center Street, Suite 200
Little Rock, AR 72201-2610
COUNSEL FOR THE STATE OF ARKANSAS AND THE ARKANSAS NATURAL RESOURCES COMMISSION

/s Nicole M. Longwell